No. 302. 80

Brf. of Niles for Appellant

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 302.

GERTRUDE JAMES NILES, APPELLANT,

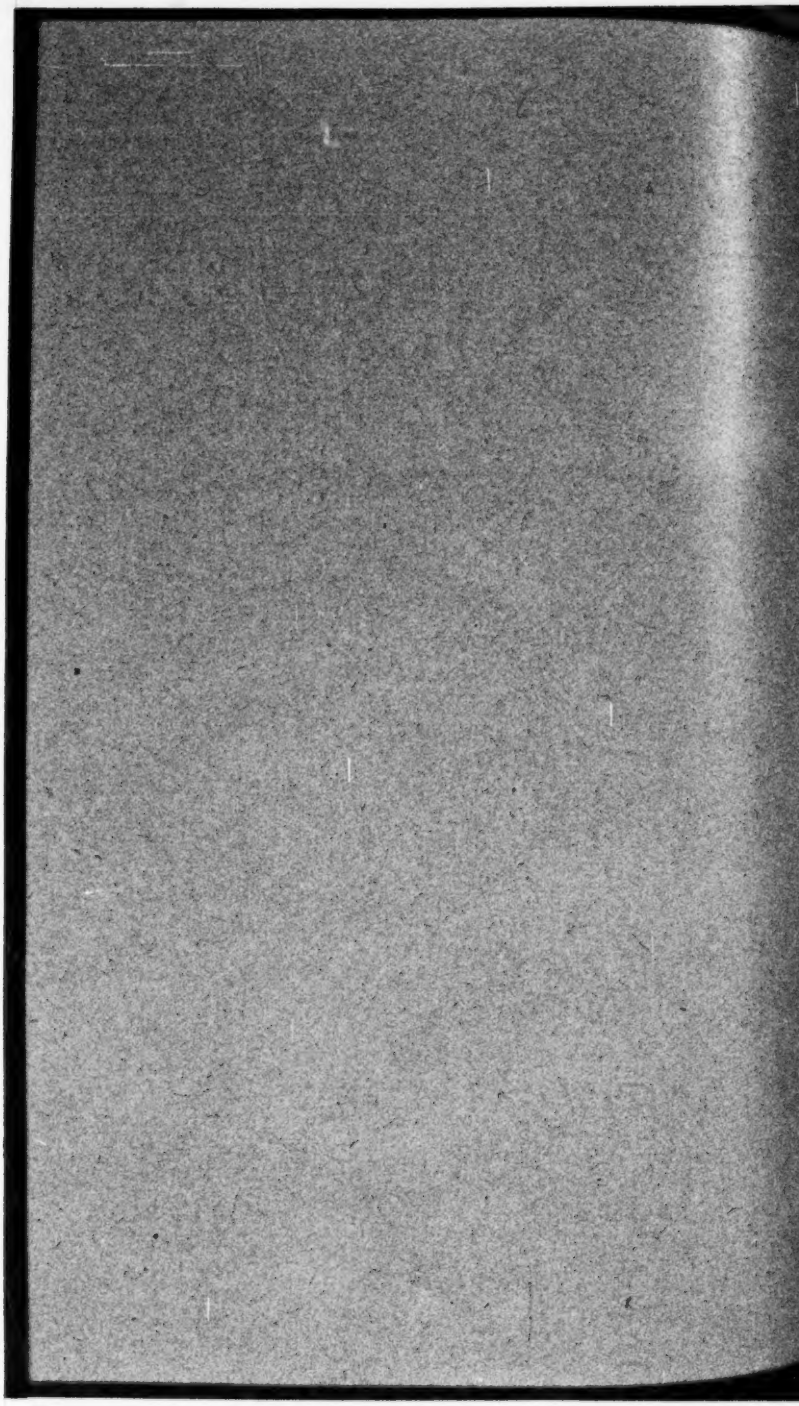
vs.

CEDAR POINT CLUB.

BRIEF FOR APPELLANT.

HENRY T. NILES
AND
FRANK C. DAUGHERTY,
Solicitors for Appellant.

The B. F. Wade Co., Printers, Toledo, O.



THE FACTS.

The facts in this case are simple and are all given in the agreed statement except what are shown by the Rice field notes and plats and official correspondence of the land office given in evidence and set out in the Record only one witness being called to make more definite a single point in the agreed statement.

I.

The material facts are these: In 1834 and 1835 Ambrose Rice, under employment of Robert Lytle, surveyor general of Ohio, surveyed and subdivided township 9, range 9, township 9, range 10 and township 10, range 10, all now in Lucas county, Ohio. In making this survey Rice meandered sections 19, 20, 21, and a little of 22, township 9, range 9, on the south shore of Maumee bay and the ballance of section 22 and sections 27, 26 and 25, township 9, range 9, and sections 30, 31 and 32, township 9, range 10 and sections 4, 9, 10 and 11, township 10, range 10 on the southwest margin of a body of water which he sometimes calls "the great marsh," sometimes "the drowned marsh" and sometimes "the inundated marsh of Lake Erie" and which is designated on the plats as "impassable marsh covered by water." Whether this marsh was a mere shallow extension of Maumee bay, as seems to us certain, and therefore part of Lake Erie, or a widening of the streams draining the upland into a continuous shallow lake or pond, Rice's notes embraced in the agreed statement leave no doubt that it was all so covered with water that it could not be surveyed.

In running this meander line Mr. Rice strictly followed the instructions in the present manual of instructions to deputy surveyors, approved by the land office in 1894, showing to a demonstration that he was acting under instructions substantially the same. These instructions as found on page 56 of Manual of Surveying Instructions, are as follows:

"At every point where either standard, township or section lines intersect—the bank of a navigable stream or any *meanderable line* corners will be established at the time of running these lines. Such corners are called meander corners and the deputy will commence at one of these corners, follow the bank or *boundary line*, and measure the length of each course from the beginning corner to the next "meander corner." In exact accordance with these instructions Rice ran each section and township line to this "impassable marsh covered

with water" and set a stake in or near its border. Then after m dering Maumee Bay three miles he starts from a meander corner where the line between sections 21 and 22 strikes the bay and foll the shore of the open bay for two chains and then follows the ma of this "impassable marsh covered with water," from meander co to corner through the three townships until it ends in the "inund marsh of Lake Erie," measuring each course as required with one ception. In section 26, township 9, range 9, he came to wha known in this record as Wolf Creek. This was in the languag the manual of instructions, page 56, a "shallow stream without well defined channel or permanent banks" which the deputy is "will not be meandered."

This stream he crossed and commenced on the other side, lea a gap of 20 chains (80 rods) in the meander line of section 26, w was not measured so that this line does not close by 80 rods.

This "impassable marsh covered with water" was separated the northeast from the open water of Lake Erie and for a short tance next the lake from the open waters of Maumee Bay by a nar strip of land, which Rice at the same time meandered on one sid the open waters of lake and bay and on the other side on this passable marsh covered by water."

This strip is divided by two narrow openings into what Rice c and the plat shows, as Cedar, Sandy and Crane Islands.

II.

Robert Lytle, the surveyor general, with the exact knowledg these premises given him by Rice's careful survey, made plats of three townships by which the eleven fractional sections on the so west of this marsh and the three islands separating it from lake bay, were sold and which by reference are made part of each of th patents given for them.

The laws of Ohio authorize copies of all government plats t recorded in the office of the surveyor of the county in which the is situated and give certified copies from this record the same forc evidence in all courts as certified copies from the land office.

Under this authority the Appellee, the Cedar Point Club, off at the trial plats of the three townships above named, duly cert as copies from the record in the county surveyor's office, and the pellant offered copies of the same townships which are certifie photo-lithographs and true and literal exemplifications of the off plats of the survey thereof on file in this office."

The plats offered by the Appellant are numbered 59, 60 and and the plats offered by the Appellee are numbered as 65, 66 and in the printed record and are inserted between pages 46 and 47, of record.

These plats substantially agree. There are four differences h ever, two of which are easily reconciled, but the other two are n significant and show that the plats from which the copies offered by Appellee were made had been changed by the government author to conform to a state of things occurring after the original plats made. The first of these differences is that the line of junctio

this "impassable marsh covered with water" with the open water of Maumee bay on plat 59, is shown by a light dotted line while on plat 65 it is a continuous black line, evidently the act of a lazy copiest.

On each of the plats 65, 66 and 67 the marsh is marked as "impassable marsh covered by water," while on plats 59, 60 and 61 this designation is on the middle plat only. But as the three townships were surveyed together and platted together it is not remarkable that this description appears only on the middle plat.

Rice's notes show that this designation was as appropriate to one as the others and was appropriate to all of them.

The third difference is much more material and shows beyond question that the government itself had changed the plats before these copies were taken to make them conform to a change, this record shows took place after the Rice survey.

It is agreed that between the time of the Rice survey in 1834-35 and the Marston survey hereafter spoken of in 1881, that Sandy and Crane Islands had been washed inshore. A comparsion of the quantities of land found by Marston in 1881 and the quantity at the time of the Rice survey shows that these islands must have washed in some 90 rods. While the plats offered by the Appellant show Cedar, Sandy and Crane islands extending the whole distance throughout the three townships with a width of 8 or 10 rods and containing over 110 acres; on the plats offered by the Appellee the quantity is omitted and the whole distance isma rked "sand ridge," and through one township this is marked by a simple black line showing that the islands had been practically swept away.

The fourth difference which shows to a demonstration that Lytle's plats had been acted upon by the government itself is that Cedar Point is marked as reserved for a light house, which could only have been done by the government.

III.

Patents for the eleven fractional sections bordering on this "impassable marsh covered by water" were issued on the 10th of July, 1844, to Margaret Bailey, that is for sections 22, 27, 26 and 25, township 9, range 9, and sections 30, 31 and 32, township 9, range 10, and sections 4, 9, 10 and 11, township 10, range 10.

It is agreed that the Appellant, Gertrude J. Niles, holds by mesne conveyances all the rights conveyed to Margaret Bailey by these eleven patents.

Patents were issued to Chester W. Norton, Oct. 16, 1861, and to Arthur D. Howells Oct. 10, 1876, for Cedar, Sandy and Crane islands.

The patent for fractional section 27, township 9, range 9 is as follows, omitting parts common to all patents: "For fractional section twenty-seven (27), in township nine (9), south of the Michigan base line of range nine (9) in the district of land subject to sale at Bucyrus, containing five-hundred and eighty-eight (588) acres and fifty-eight hundredths of an acre, according to the official plat of the survey of said lands as returned to the general land office by the Surveyor General."

The others are precisely like it except section, township, number of acres, etc.

IV.

From the official correspondence of the land office offered in evidence and given in the printed record commencing on the bottom of page 33, it appears that in 1850 the State of Ohio, under the swamp land act of that year demanded the whole of this marsh in the three townships as swamp land.

The land demanded is described as follows:

Deep marsh covered with water,	- -	9 S 9 E	2,500 acres.
" " " " "	- -	9 S 10 E	1,500 "
" " " " "	- -	10 S 10 E	2,000 "
			6,000 acres.

The State claim was rejected in these words: "Not swamp and nearly all sold."

This rejection on this ground was persisted in for 20 years up to July 29, 1872, as appears by the letter to Hon. John Sherman of that date, on page 35 of the Record.

It will be noted that at the time of this rejection nothing had been sold in anyway connected with this land except what was conveyed by the eleven Bailey patents.

We have given these facts with a good deal of fullness, because we think the errors complained of resulted from a failure of the court below to get a clear idea of them.

V.

During the months of April and May, 1881, John B. Marston, under appointment of the land office under a then recent ruling shown in a circular given in the Record, page 38, surveyed and subdivided this whole marsh shown on the plats, taking as his southwestern boundary the meander line run by Rice through the eleven Bailey fractional sections and on the other sides the open water of Maumee Bay and Lake Erie, for some reason not apparent, entirely disregarding the Rice survey of Cedar, Sandy and Crane Islands, and the patents issued for them to Norton and Howells.

In making this survey Marston first extended the lines of the eleven Bailey fractional sections precisely as the act of 1805 required until they met or struck the open water of the lake or bay.

The irregular portions of these sections between the meander line as run by Rice and the section lines so extended, Marston subdivided into 59 parcels containing according to the amounts given in the patents for them 2,952.87 acres, 28 of which have an irregular zigzag boundary on the southwest, leaving the balance of these fractional sections with a like zigzag boundary on the northeast.

The character of this newly discovered boundary line is shown by the plats of the Marston survey, offered by Appellee, and marked 62, 63 and 64 among the plats, between pages 46 and 47 of the Record.

It is safe to say that such a line so impossible to observe and maintain running eleven miles in every direction, and in no direction long with such sudden turns and such acute angles, without a mark

in the whole line, or a natural object of any kind to use as a mark, was never before seriously contended for as a boundary to stand for all time. Certainly not as an outbirth of the simplest land system ever devised, simpler even than the old Roman system, recognizing nothing but north and south and east and west lines and natural boundaries, except older boundaries.

The portions of the marsh outside of the Bailey fractions so extended Marston divided into 26 parcels containing 1,747.13 acres.

It is agreed that patents were issued for 94 of these 95 parcels to H. Melville Hanna and for one to Phillip La Corse, and that the Appellee, the Cedar Point Club, has all the rights conveyed by these 95 patents.

It appears from Marston's statement returned to the land office, which is adopted as part of the agreed statement, and from the Marston plats offered in evidence that at the time of his survey in 1881, no water stood permanently on these premises except in pond holes or as the Court below finds from Marston's statement that it was "a body of low, swampy land, partly boggy, partly dry," though sometimes subject to temporary inundations from northeast winds. See paragraph 17 agreed statement, page 29 Record.

It is also agreed (paragraph 18, page 30 Record) that at the time of the commencement of this suit Dec. 18, 1895, and for two or three years previous the premises were practically dry.

It is also agreed that the water in the lake was somewhat above its usual level at the time of Rice's survey.

These are all the material facts in the case as we think fairly stated. Under these facts the Cedar Point Club makes this claim in its amended bill given on page 41 of the Record.

That the meander line run by Rice through the eleven fractional sections was a boundary line of the lands patented to Margaret Bailey "leaving in the United States Government the title to the lands designated as 'impassable marsh and water'" outside of the meandered line.

The decree of the Court below sustains this claim to its fullest extent.

The Court say: "If the meander line following the margin of this swamp was intended as a boundary line the decree below must be affirmed, otherwise it must be set aside."

THE ARGUMENT.

We hold that the decree was clearly erroneous, and we submit these propositions for the consideration of the Court.

I.

We hold that the Court clearly erred in holding that the meander line run through the eleven Bailey fractional sections formed eleven exceptions to the admitted rule that "the meander line is not run as a line of boundary."

II.

We hold that the Court clearly erred in holding from the evidence disclosed in this record that the premises in controversy were not part of Lake Erie at the time of Rice's survey as found by the Supreme Court of Ohio, in James vs. Howells, 41, O. S. 696.

The Court below admits that if at the time of Rice's survey the premises in controversy were part of Lake Erie, they never belonged to the United States but to the State of Ohio, and that "the title of the Cedar Point Club would fail without regard to the goodness or badness of the title claimed under the doctrine of reliction by the Appellant," and this is undoubtedly sound law.

III.

If the premises in controversy were not part of Lake Erie, but a shallow lake or pond, the result would be the same as to the title of the Cedar Point Club, as this Court in Harden vs. Jordan, 140 U. S. 381, middle of the page says: "It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees."

If these premises were not part of Lake Erie they certainly were a shallow lake or pond, and the land under it would belong to the State or to the reparian proprieties as the State might decide.

IV.

If, however, the premises in controversy were neither part of Lake Erie or a lake or pond but anything like what they are described in the opinion of the Court below, "a body of low, swampy land, partly boggy, partly dry," then this case would come under the case of Whitney vs. Detroit Lumber Co., 78 U. S., 240, approved by this Court in Horne vs. Smith, 159 U. S., 45, and there being no water line to limit the grants, they would be limited by the line of the section granted in the patents extended as Marston extended them.

I.

The first proposition we submit is that

THE MEANDER LINE IS NOT A BOUNDARY LINE.

The Court below give this statement of the rule as to the meander line.

"For the purpose of ascertaining the quantity of upland to be paid for, a line meandering the line of such waters is run and *where this is the purpose of running such a line* it is not regarded as a boundary, but as only pointing out the sinuosities of the bank, and for the purpose of arriving at the quantity of land to be paid for."

And these authorities are quoted to authorize this statement:

Rail Road Company vs. Shurmeir, 7 w. 272; Harden vs. Jordan, 140 U. S., 371; Horne vs. Smith, 159 U. S., 41.

In this connection we will call the attention of the Court to the plats offered by the Appellee, itself before referred to being the three last plats, marked 65, 66 and 67, found in the record between pages 46 and 47, on which the Bailey fractional sections were sold and which by reference are made part of her patents.

Let us examine this statement of the rule as to the meander line, which clearly implies that it is sometimes run as a boundary to stand for all time, as the Court held the Rice line was in connection with the plats offered by the Cedar Point Club and the authorities cited.

In Rail Road Co. vs. Shurmeir, 7 W., 272, Judge Clifford speaking for the Court says: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, *not as boundaries of the tract* but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale and which is to be paid for by the purchaser."

But to leave no possible question he adds:

"In preparing the plat from the field notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water course and not the meander line is the boundary."

This language of Judge Clifford is quoted with approval by this Court in another of the cases referred to by the Court below, Harden vs. Jordan, 140 U. S. 381.

The Court in this case further says:

"It has been the practice of the Government from its origin in disposing of the public lands to measure the price to be paid for them by the quantity of upland granted, no charge being made for the land under the bed of the stream or *other body of water*. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the quantity of upland to be charged for and not for the purpose of limiting the title of the grantee to such meander lines."

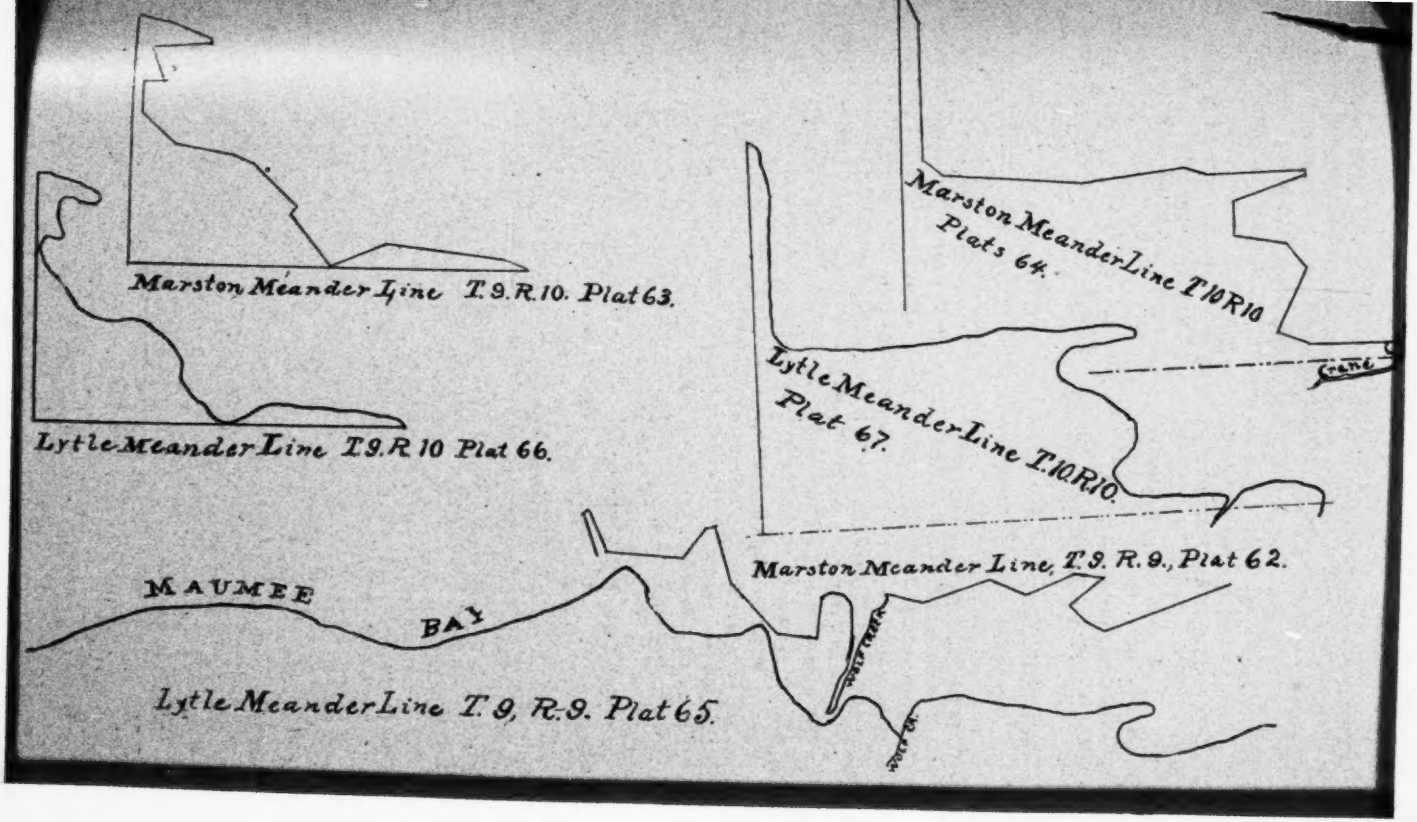
How plainer language could be used it is difficult to see.

To show the Court at a glance how completely the language of Judge Clifford, which has been not only approved by this Court but by the Supreme Court of every State formed from this Northwestern territory, for the sale of which our land system was *devsied*, applies to the case at bar, and how contradictory and self destructive the evidence offered by the Cedar Point Club itself is, we give on the opposite page the meander line as shown on the Lytle plats offered by the Appellee marked 65, 66 and 67, aud the meander line as actually run by Rice and held by the Court below to be the boundary of the Bailey fractional sections as shown on the Marston plats 62, 63, and 64, drawn side by side.

But the position of the Court below fares no better in the other case quoted, (Horne vs. Smith, 159 U. S., 40), for the Court in that case, says page 43:

"It is also true that the *meander line is not a line of boundary* but one designed to point out the sinuosities of the bank of the stream and as a means of ascertaining the quantity of land in the fraction to be paid for by the purchaser." The Court further says on the same page: "That a water line runs along the course of the meander line cannot of course, in the face of the plat and survey, be questioned."

Yet in the face of the Lytle plat, offered by the Appellee itself, the Court does question that a water line existed, or rather holds that if it did exist at that particular time it was exceptional and not to be


Marston Meander Line T.9.R.10. Plat 63.
Lytle Meander Line T.9.R.10 Plat 66.
Marston Meander Line T.10R10
Plats 64.
Lytle Meander Line T.10R10.
Plat 67.
Marston Meander Line, T.9. R.9., Plat 62.
MAUMEE
BAY
Lytle Meander Line T.9, R.9. Plat 65.

considered, and this extraordinary proposition is based on the fact that according to the stipulation of the parties, as stated by the Court: "At the time of Rice's survey there was an unusual amount of water standing or flowing over the disputed land."

It is enough to say of this, that stipulations are to be construed with reference to the facts known, or that might be known, by the parties making them. Prior to 1834, no one but the red man saw the stages of water on the disputed premises, and he kept no record, and these parties could have no more knowledge on that subject than on the stages of water in Lake Erie at the time of Abraham, and the stipulations must of necessity refer to stages since that time.

Since then the water has declined both in Lake Erie and on the premises in controversy, and for this we have three reasons.

The sixty-thousand acres of upland drained into this marsh, then a dense forest, is now a rich body of farming land, and it is a matter of common knowledge that the destruction of such a body of timber would diminish the rain fall, and opening it to the sun causes a greater evaporation of what does fall, and cultivated fields absorb much more than forests. And what is true of these thousands of acres drained into this marsh is equally true of the millions of acres drained into the Great Lakes, where populous and prosperous States have taken the place of the Northwestern wilderness, and the water in the lake and on the premises in controversy has necessarily continued to grow less until, as this record shows, it had entirely disappeared, when this suit was commenced, from the disputed premises.

But suppose the water was exceptionally high at the time of the Rice survey, what of it.

The Government selected 1834 and 1835 to ascertain what it had for sale in these townships, and what was covered by water and should be turned over to the State.

Rice surveyed every foot that was not so covered by water that it could not be surveyed.

Lytle made his plats showing the water on these premises as a natural boundary of the premises to be sold. The Government sold, by these plats, all this land, and made the plats showing the water line as the boundary a part of the patents.

It is now seriously contended that if the Government found that at the time of the survey and sale the water was unusually high and when it receded to its ordinary line, a strip one or two or ten rods wide was left uncovered, the Government could come back and survey and sell it, and the rule that would authorize this survey and sale would authorize the survey and sale of a like strip from Niagara to Duluth and Chicago, all around the lakes.

Suppose the water had been unusually low and afterwards rose and covered part of the land inside the meander line, could the purchaser say to the Government, you sold me part of Lake Erie, and I want my money back.

The Government made this plat to show what land it had for sale. Both parties accepted the plat as giving the truth as to what was lake and what was land, the sale was made and the plat was made part of the conveyance, and neither party can be heard to question it,

least of all the Government which made the plat and made the sale and against which as grantor, as held by this Court in Harden vs. Jordan, the transaction is to be most strictly construed.

It is evident the Court below confuse the meander line as run by Rice and the water line shown on the Lytle plats.

The Court gives one of the Lytle plats, offered by the Appellee, showing the water line as the boundary of the Bailey grants, and says in the opinion: "It would be useless to speculate as to reasons which induced Rice to make *the marsh* the boundary of the fractions bounded thereon; that he did so there can be no doubt." Yet the Court in the decree makes not the *marsh*, or the water line shown on the Lytle plats the boundary, but the meander line actually run by Rice.

The proposition that Rice, a deputy surveyor, hired by the mile to make this survey, and under the strictest instructions from the land office, and under the absolute control of the Surveyor General, could make anything a line is but little short of preposterous. He was simply hired to make this subdivision by lines running North and South and East and West, unless he came to a natural boundary or an older boundary, which he was to locate, and when this was a natural boundary, that is a body of water, he was to point out its sinuosities and ascertain the amount of upland to be paid for. This he did most faithfully. Surveyor General Lytle made the plat and laid down the water line.

There is not the slightest indication in Rice's field notes that he did anything more or less than every deputy surveyor is required to do in running every meander line.

If what Rice did in this case makes the meander line run by him the boundary of these eleven Bailey fractional sections, precisely the same action by every other deputy surveyor should make every other meander line ever run a boundary.

This was undoubtedly the idea which prompted the Land Office to issue the circular under which the Marston survey was ordered, which as Judge Redfield well says set all the "land sharks of the country to gathering up the angles and gores and margins covered by it.

Yet, so far as we have been able to find, no Court has ever sustained a patent granted under it, while patents without number have been set aside, as in the case of Harden vs. Jordan.

It would hardly seem necessary to say more on the proposition that the meander line as run is not a boundary in this case, or in any other, but on account of the importance of the question to the parties and as the Court below frankly admits that unless the meander line as run by Rice and adopted by Marston, was run as a boundary the decree, they affirm, should have been set aside; the Court will pardon a brief review of the authorities on this question.

The first case ever carried to a Court of last resort under our land laws was Gavitt vs. Chambers, 3 O., 497, which was decided in 1828, seven years before the Rice survey was made and must have been well known to the Land Office as the only case giving a construction to their acts. In that case, as in this, the premises were meandered and the land below high water mark was not paid for to the United States.

The Court say: "The land usually covered by water has been deducted from that on which purchase money has been charged. This, it is claimed, is a fact conclusive to establish the proposition that the individual purchaser acquires no title to the bed of the river adjoining his lands. But we do not think it properly attended with this consequence. It is we conceive vitally essential to the public peace and to individual security that there should be distinct and acknowledged ownership, both to the land and water of the country. Otherwise intruders upon the common waste would fall into endless broils among themselves, and would involve the owners of adjacent lands in controversies innumerable. The United States would be little interested in preserving either the peace or the property, and would be powerless to do so without an interference with the policy of the State, as unsuitable for the Union to exercise as it would be inconsistent, if not dangerous to State soverignty.."

No better reason could be given for the rule laid down in Harden vs. Jordan as universal that "it has never been held that the United States reserves the land covered by water in front of its grants."

We can hardly conceive the confusion which would arise if the Government was held to be the owner of every lake or pond meandered by if when the adjoining land was sold.

This decision in 3 O., is held in June vs. Percell, 36 O. S., 407, to be the settled law of Ohio, and both the reasoning and the language of Judge Clifford, above quoted from 7 W., 286, is approved and adopted.

The Supreme Court of Michigan, in Palmer vs. Dodds, 64 Mich., 475, say: "The meander lines have no significance as boundaries, and are not intended as such."

The Supreme Court of Indiana, in Stoner vs. Rice, 121 Ind., 52, says: "To hold that the meander line constitutes a boundary would be against the great weight of authority, indeed the authorities are almost unanimous against such a doctrine."

The Supreme Court of Wisconsin in, Detroit Lumber Company vs. Whitney, 78 Wis., 240, in a case where a lake was shown on the plat, where no lake existed, disregarded the meander line and gave the grantee of a fractional quarter section the full quarter section with its lines extended until they met.

The Supreme Court of Iowa, in Schlosser vs. Cruckshanks, 65 N. W., 344, a most carefully considered case, rejected the meander line as a boundary, although it was proved that more dry land lay outside than inside the meander line at the time of the survey and sale, and quotes as authority for this ruling 28 cases, Federal and State.

Indeed, we have found but one case in a Court of last resort, neither have the learned counsel on the other side, that holds that the meander line was ever run as a boundary.

This is the case of Lammers vs. Nissen, 4 Nebraska, 245, and the holding in this case is more seeming than real.

The syllabus takes the broad ground that when it can be proved *aliunde* that the meander line departs from the winding of the stream, a Government grant is bounded by the meander line and does not extend to the stream.

The decision in the case was unquestionably right, though the statement in the syllabus is against all the authorities.

The Court, in their opinion, say the evidence establishes the fact that the surveyor "supposed the slough, on the West side of which he was running, was a portion of the river." This slough meandered was called on the plat the Missouri river, which was more than a mile away.

The slough meandered was unquestionably a legal boundary and the mistake in calling it the Missouri river was so palpable that any Court would correct it.

The Supreme Court of Iowa, in Schlosser vs. Cruckshank, 65 N. W., 346, in which this case was quoted as authority for the doctrine contended for by the Appellee, in the case at bar says: "The meander line as run did not touch the river but was along the banks of an ancient slough. The case appears to hold that while the plat showed the meander line to run along the river, evidence *aliunde* could be introduced to show that it was not the river which was meandered but the slough."

The case of Glenn vs. Jeffries, 75 Iowa, 20, was quoted to the same effect, in Schlosser vs. Cruckshank, above referred to as it was by counsel in this case, but the Court say of it: "Glenn's case was one where the Government surveyors in making the survey meandered a bayou, which it would seem they supposed was the Missouri river. This bayou was a body of water which furnished a natural boundary and it was this body of water which was in fact meandered, and not the river. Plaintiffs took to the body of water actually meandered, not to the body of water that lay beyond it. Beyond this bayou, which in fact was meandered, lay the land in controversy which was not meandered at all, and it was held the Plaintiff had no title to this land."

The Court below say the case at bar is governed by that of Horne vs. Smith 159 U. S., 40.

In that case lot 7, in section 23, and lots 1 and 2, in section 26, were meandered on a bayou which was called the Indian river, which in fact was a mile or a mile and a half west of this bayou and in section 22 and 27.

The preposterous claim was made by the patentee of these three fractional lots, that on account of this mistake in the name of the water course meandered, these lots should be extended beyond the water course meandered, and beyond the legal boundry of the lots patented, which could only contain 80 acres if full, and beyond the sections of which they were a part and across two other sections not named in the patent, to the real river.

The bayou being a legal boundary nothing is clearer than that a mistake in naming it would be corrected, and if it was not the grant would be confined by its very terms to the portion of the sections named, of which the fraction was a part, as in the case of Whitney vs. Detroit Lumber Co., 78 Wis., 240, quoted by this Court with approval, and in Palmer vs. Dodds, 64 Mich., 475, and Stoner vs. Rice, 121 Ind., 50.

The Court expressly say that: "The question in the case is whether the boundary of the lots is the bayou or the main body of the river."

How this declaration that meandered fractions are bounded by the water course actually meandered can be tortured into authority for making the meander line actually run and not the body of water meandered the boundary would be difficult to see, even if the Court had not in express words excluded the conclusion drawn from it by the Court below, by expressly declaring, page 43, that: "It is also true that the meander line *is not a line of boundary* but one designed to point out the sinuosities of the bank of a stream, and as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser."

II.

We come now to our second proposition, that the premises in controversy were at the time of Rice's survey

PART OF LAKE ERIE.

The Court below admits that if the premises in controversy were at the time of Rice's survey part of Lake Erie that, "the submerged lands would not be subject to grant by the United States, and the title of the Cedar Point Club would fail without regard to the goodness or badness of the title claimed under the doctrine of reliction by the Appellant."

In support of this proposition the Court quotes the following cases:

John Pollard, et al., lessees, vs John Hagan, 3 How., 212; McCready vs. Virginia, 4 Otto., 394; Weber vs. Harbor Commissioners, 18 Wall., 57; Hardan vs. Jordan, 140 U. S., 371, and Scranton vs. Wheeler, 16 U. S., 152.

The later carefully considered case, Illinois Central R. R. Co. vs. Illinois, 146 U. S., 387, not quoted by the Court, is conclusive that this proposition of the Court below is sound law.

In James vs. Howells, 41 O. S., 696, involving these premises, where besides the field notes and plats, a large number of witnesses were examined, including many engineers, the Supreme Court of Ohio found from the evidence, "on both sides," that "Rice and Lytle treated the bank along the South edge of this so called impassable marsh covered with water, as the shore of Lake Erie, the marsh as part of the lake and Cedar, Sandy and Crane Islands as islands in the lake.

* * The meander line along the southerly edge of the marsh was in fact along the southerly edge of the lake."

Here we meet with a singular thing. In the Court below, while the learned counsel on the other side stoutly contended that the decision in the above case was entirely erroneous, as they were compelled to do, to maintain any standing in Court, they make much of a pure *obiter dictum* in the same case, as follows:

"Moreover the act of 1805 expressly provides that the boundary lines actually run, and marked in the survey returned by the Surveyor General, shall be established as the proper boundary lines of the sections or subdivisions of which they were intended, and the length of

such lines as returned shall be held and considered the true length thereof." Including the *meander*, all the lines of Margaret Bailey's fractional sections were actually run, marked and returned. Hence the provision touching lines not so run and marked does not apply to her lands."

In the first place nothing is plainer than that this provision of the act of 1805 refers to the lines named in the Laws, which are only North and South and East and West lines except when a natural boundary, that is a water course, or an Indian boundary or an older boundary interferes, and can by no possibility apply to a line nowhere named in our land laws but devised by the Land office, as Judge Clifford says, "for the purpose of defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of land in the fraction subject to sale and which is to be paid for by the purchaser."

Second, Rice did not make a single mark on the whole eleven miles of this line, and we challenge the production of one scintilla of evidence from this record that Rice did anything in connection with this meander line that every deputy surveyor is not required to do in running every meander line ever run.

This simply shows what a mistake it is for Courts to leave the well considered principles and facts decisive of a case to talk from the impulse of the moment of outside questions and facts, in no way material.

If the premises in controversy were at the time of Rice's survey part of Lake Erie, or even a shallow lake or pond, this Court has held in Hardin vs Jordan, 140 U. S., 381, that the Courts of the State have the sole right to say what the rights of riparian properties are, and the rights of the United States as riparian proprietor are in no respect different from or superior to the rights of an individual.

The Supreme Court of Ohio, in Sloan vs. Baymiller, 34 O. S 492, fixes the boundary of all riparian proprietors on Lake Erie, at "the line at which the water usually stands, when free from disturbing causes," and this as applied to the case at bar means as the water stood in 1834 and 1835, and not as it stood one year or ten years before that date, or nearly fifty years after when Marston made his survey in 1881.

In considering the rights of the Appellant, this decision renders it unnecessary to consider the learning on the subject of reliction for the boundary lines being fixed "at the line at which the water usually stands when free from disturbing causes," if the water rises and advances upon the lands of the riparian proprietor his line must of necessity retire, and if it retires his line must of necessity advance as the water recedes.

If, then, the premises in controversy were at the time of Rice's survey part of Lake Erie, and during the sixty years from that time to the commencement of this suit the waters of the lake had retired as this record conclusively shows from all of them, it seems plain that the line of the Margaret Bailey frational sections advanced year by year as the water retired, and we see no escape from the conclusion that at the commencement of this suit all the premises in controversy

belonged to the Appellant, of course subject to any rights of Norton & Howell as patentees of the islands, which can in no way be affected by this suit.

If the case of James vs. Howells, 41 O. S., 696, had been between the same parties as well as involving the same subject matter it would of course end the case, but as the Court below say not being between the same parties it has not the force of *res adjudicata*, and this case must be decided on the facts in this record, giving to the opinion of Ohio's Court of last resort such weight as the high position of the Court and the fact that its decision was based on a fuller knowledge of the facts than this Court has, or any other Court can ever have, may entitle it.

On the question under consideration the Court below say (see page 56 Record): "While under the stipulations as to the facts we must regard the condition of the marsh at the time of Rice's survey exceptional, we have no such liberty in regard to its condition when Marston made his survey. * * * There is no evidence in this record that the land in controversy *is* land continually under not less than six inches of water, in seasons when the water is lowest, such as was found in the Ohio case. No such state of facts is shown in this record and by no stretch of imagination could any Court, upon this record conclude that *this low, swampy body of land, partly boggy, partly dry*, and sometimes subject to temporary inundations, was so continuously under the water of the great lake as to be part of it."

It will be seen that this important question, according to the Court's own statement, was not decided on the evidence in this record as to the condition of the premises in 1834 and 1835, when Rice could not survey a foot of them on account of the permanent presence of water, but on their condition near fifty years after that date when the water of the lake had so far subsided, from the causes above stated, that Marston could and did survey the entire marsh and found no water standing on any part of it except in the pond holes, and no water line except that of the open waters of the lake and bay, as his plats show.

And all this, because it is stipulated that the water of the lake was above its ordinary level at the time of Rice's survey

It is enough to say of this extraordinary proposition, in addition to what has already been said, that if the water was unusually high during the years of 1834 and 1835, "the water as it usually stood when free from disturbing causes," during these years was the boundary of the lands held by the United States as riparian proprietor fixed by the Supreme Court of Ohio, in Sloan vs Baymiller.

The United States being a mere riparian proprietor with precisely the same rights as any other riparian proprietor, no more, no less, the Government selected these two years to decide what was lake and what was land, or in other words, what belonged to the State and what to itself, and by the very terms of the transaction the Government transferred to its grantee, by the Bailey patents, all rights it might have acquired by holding the land until the water was lower, subjecting the purchaser to all loss it might have sustained if the water had risen higher.

It is a matter of common knowledge that the loss incident to having such a neighbor is not small. As an illustration of this self evident fact, it may not be improper to state that nearly half the land inside the meandered line, in sections 19, 20 and 21, bordered by this aggressive and irresistible neighbor as shown on the plat, given in the opinion of the Court, page 50, patented to Margaret Bailey at the same time as the eleven involved in this suit and paid for by her, have been washed away and are now part of Lake Erie.

What then does this record show as to whether these premises in 1834 and 1835, were lake or land.

The following is the evidence and all the evidence disclosed by this record on the subject:

1. Rice, in the two years he was engaged in this survey, did not survey any of the disputed premises, although he surveyed all round them except for about three-quarters of a mile on the East, where the meander line of the main land is separated from the meander line of the islands, as shown on plats 61 and 67, by what Rice calls "the inundated marsh of Lake Erie," and on the west for about one mile and a half where the dotted line on plat 59 and the continuous line on plat 65 show that the impassable marsh covered with water joined the open waters of Maumee bay.

His field notes are conclusive evidence that he did not survey these premises because the water on all parts of them was so deep as to render them impassable and of course unsurveyable.

2. Rice meandered the so called islands, separating the "impassable marsh covered with water from the lake and bay on one side on the marsh and on the other on the open waters of the lake and bay, and must have found the waters on both sides standing substantially on a level or he would not have called them islands.

An island does not mean a body of land with water on one side and "*a low, swampy body of land, partly boggy, partly dry,*" on the other.

3. In the official correspondence with the Land office (see page 36 of Record), in connection with which investigation must of a necessity have been made, both by officials of the Land office and of Ohio, the premises are described as follows:

Deep marsh covered with water, - -	9 s 9 e	2,500 acres.
" " " " " - - -	9 s 10 e	1,500 "
" " " " " - -	10 s 10 e	2,000 "
		6,000 acres.

4. But it seems to us the Lytle plats, 65, 66 and 67, offered in evidence by the Cedar Point Club itself, and found between pages 46 and 47 of the record, are conclusive on this question.

And let it be noticed that Lytle's plats when approved by the Land office and incorporated in the Bailey patents, were the final action of the Government, which cannot be questioned by the grantee, and much less by the grantor who made them and sold the land by them.

Plat 65 offered by the Appellee, and given in the opinion of the Court, page 50, shows a water line extending more than three miles along the South shore of Maumee bay and continued through the balance of the township, and through township 9, range 10, and

township 10, range 10, in plats 66 and 67, without a break, along the Southwest margin of this impassable marsh covered with water. Three-quarters of a mile north of this, and across what Rice calls "the inundated marsh of Lake Erie," another water line commences, running along the Northeast margin of this marsh and Southwest of the islands, some eleven miles to Cedar Point, and then South along the margin of the marsh about half a mile to the South end of Cedar Point, where it strikes the open water of the bay, with open water for a mile and a half separating this meander line from the other.

That the premises in controversy, this "impassible marsh covered with water" ends in the open water of the lake is clear. Rice's field notes, on page 15 of the record, are as follows: "East between Secs. 11 and 14, 36.00 to Crane Creek 1.00 wide, runs N., stagnant; 40.00 set a post for Cor. of quar. secs. in inundated marsh; 75.00 set a post in S. W. margin of inundated marsh of Lake Erie." He made no attempt to survey any part of Secs. 12 and 13, T. 10, R. 10 east of 11 and 14, and all the plats show that this inundated marsh of Lake Erie was entirely open to the lake on the northeast.

That is, this "impassable marsh covered with water," or as the Land office has it, this "deep marsh covered with water," ends at one end in "the inundated marsh of Lake Erie," and at the other in the open water of Maumee bay, without a break, or a foot of land intervening anywhere, and is clearly a mere extension of the bay, where, on account of the shallowness of the water and the protection of the islands, aquatic vegetation grew.

Indeed the light dotted line, on plat 59, showing the junction of the marsh and bay, excludes the idea of a land line of separation between them.

How a more complete demonstration could be made, that the premises in controversy, were a continuous body of water, connected at one end with the open waters of the bay and at the other end with the water of the lake itself, in this "inundated marsh of Lake Erie," it seems impossible to conjecture.

In the language of the Supreme Court of Ohio, in James vs. Howells, 41 O. S., 696, above quoted, this "impassable marsh and water was part of Lake Erie, and Cedar, Sandy and Crane Islands were islands in the lake."

5. But the lake itself has made a record on this subject that admits of no question.

It is admitted in the agreed statement that Sandy and Crane Islands were washed inshore between the Rice survey in 1834-35, and the Marston survey in 1881 (see last clause of paragraph 18, page 30, Record).

In the official correspondence of the Land office, page 34 of Record, the premises in controversy are spoken of as containing 2,500 acres, in township 9, range 9, and 1,500 in township 9, range 10, and 2,000 in township 10, range 10, or 6,000 acres in all, which is practically what it shown by the Lytle plats.

Indeed, we must presume that both the State of Ohio and the Land office, having every means of accurate *knowledge* on the subject, are substantially correct.

The amount named in the 95 patents under which the Cedar Point Club claims, added together, amount to 4,700 acres, which shows that 1,300 acres which were inside of the islands at the time of Rice's survey, were in the open lake at the time of Marston's survey.

Sandy and Crane Islands are about 7 miles long, which would give 14 acres to the rod in width, so that these islands must have been washed in about 90 rods to account for the loss of this 1,300 acres. But this is not all. Plats 59, 60 and 61, show Cedar, Sandy and Crane Islands, for the whole eleven miles, as some 6 or 8 rods wide, and containing over 110 acres, while on the plats 65, 66 and 67, offered by the Cedar Point Club, the quantity is wholly omitted and the former islands are marked "sand ridge," except for a little distance on the East end of Crane Island.

This shows to a certainty that this whole chain of islands had been literally swept away, and they must simply have been rolled over and over in the water, in what Rice calls the "inundated marsh of Lake Erie," and not swept up by the Northeast winds on comparatively dry land, or we should have sand hills instead of a sand ridge.

The waters of Lake Erie must have been unusually high, much higher than they are shown by this record to have been, since to give its waves the mighty sweep and power to roll these island inshore for 90 rods.

The plats offered by the Appellee must have been copied from the Lytle plats, so changed by the Government itself as to show this great change, as well as the reservation of Cedar Point for a light house, after the original plats, photo-lithographs of which were offered by the Appellant, 59, 60 and 61, were made.

Supported, as it is, by this array of facts in the record, and mainly evidence offered by the Appellee itself, this Court will hardly be disposed to treat the finding of the Supreme Court of Ohio, that the premises in controversy were, at the time of Rice's survey, part of Lake Erie, and that the meander line run by Rice along the South bank of this impassable marsh and water "was, in fact, run along the shore of Lake Erie," as going beyond the range of a healthy imagination, as the court below does.

III.

OUR THIRD PROPOSITION

is that if the premises in controversy were not a part of Lake Erie, which it seems to us absolutely certain this record shows that they were at the time of Rice's survey, they were certainly a shallow lake or pond which the Government itself decided was meanderable, and as between the Government and the State of Ohio the land under it belonged to the State of Ohio, and the State of Ohio by a long line of decisions beginning with Garrett vs. Chambers, 3 O., 497, and ending with Limbeck vs. Nye, 47, O. S., 336, has surrendered all its rights to riparian properties.

The fact that the Government meandered this body of water and sold the premises, with this water line as the boundary, is in the first place the strongest evidence that it was such, and the Government itself and its grantee, the Cedar Point Club, would be most certainly

estoped from denying the facts shown by the plat after the sale, even if it had not acquiesced *in* it *for near* fifty years, the Government holding for many years that it had sold substantially all it had by the Bailey patents.

IV.

OUR FOURTH PROPOSITION

is that if the premises in controversy were neither a part of Lake Erie, or a shallow lake or pond, but were at the time of Rice's survey anything like what they are described by the Court below, "a body of low, swampy land, partly boggy, partly dry," or as counsel on the other side are fond of calling them, a "mere swamp," then the meander line was a pure mistake as well as the declaration of the government, persisted in for twenty years, that they "were swamp lands."

Swamp lands are never meandered but are surveyed with the upland, for the manifest reason that there is no continuous water line as a boundary.

Millions of acres of swamp lands have been surveyed by the Government and turned over to the States. If these premises were of such a character the meander line was a pure mistake of Rice, and platting it was a mistake of Lytle, and approving that plat was the mistake of the Land office, a series of mistakes a Court will hardly presume, in the face of the volume of evidence which shows there was no mistake; but assuming all this there being no meanderable body of water to limit the grants, by their very terms Margaret Bailey took the fractional sections extended precisely as Marston extended them.

As in the case of Whitney vs. Detroit Lumber Co., 78 Wis., 240, approved by this Court; in Horne vs. Smith, 159 U. S., 40, the plat showing that a lake purported to have been meandered when no lake existed, in the language of this Court, in that case, on page 45, the grant would convey "to the straight line which would have been the boundary of the quarter section, if accurately surveyed."

The only change in this language, to fit it to the case at bar, is to substitute *section* for *quarter section.*

It is true that under any of the claims made above that the Appellant would get more land than Margaret Bailey paid for, and counsel on the other side make much of the fact. Margaret Bailey only paid for about 4,000 acres, while the fractional sections extended contain near 7,000 acres.

Under this last proposition she only paid for 589 acres in section 27, township 9, range 9, and 585 in section 9, township 10, range 10, and 495 acres in section 10, township 10, range 10, while she would get 51 acres more in one case, 55 acres in another and 145 acres in the other, and more in some other cases; but if this was a pure blunder of the Deputy Surveyor and the Surveyor General and the Commissioner of the Land office, the conveyance was made, it was acquiesced in for near fifty years, and even if shown, no Court would correct it after this long delay.

If the field notes are true and the plat is the substantial truth, this land outside of the meander line was every foot of it absolutely worthless, and the Government got pay for all worth selling, and all

gained is gained under the liberal policy of the Government and the liberal decisions of Ohio, and by the action of the laws of nature acting continuously for sixty years.

IN CONCLUSION.

We submit these three alternative propositions:

I.

If the premises in controversy were at the time of Rice's survey, part of Lake Erie, as the Supreme Court of Ohio held in James vs. Howells, and as we claim this record conclusively shows, then under the ruling of this court, in Illinois Central Railroad Co. vs. Illinois, 146 U. S. 387, no part of them belonged to the United States, but they belonged to the State of Ohio, and under the ruling of the Supreme Court of Ohio, in Sloan vs. Baymiller, 34 O. S. 492, the water as it usually stood on these premises, when free from disturbing causes, at the time of Rice's survey (for the sale dates back to the time of making the survey and plat), was the boundary of the Bailey grants.

As this record shows conclusively that during the sixty years between the Rice survey and the commencement of this suit the waters of the lake had retired from all the premises in controversy, the line of the Bailey grants followed the water as it retired year by year, being at all times where it stood when free from disturbing causes, and all these premises would belong to the Appellant subject to the rights of Howells and Norton as patentees of the island.

II.

If these premises were not a part of Lake Erie then they most certainly were a shallow, meanderable lake, for this Court holds, in Horne vs. Smith, 159, page 43: "That a water line runs along the course of the meander line cannot, of course, in the face of this survey and plat be questioned."

That is it cannot in the face of this survey and the Lytle plats be questioned that a meanderable body of water existed where the plat shows it to have existed. If this body of water was not part of the lake, still as between the United States and the State, it belonged to the State as held by this Court in Harden vs. Jordan, 140 U. S., 371.

That case holds that it is for the State to say whether it will hold it or relinquish it to the riparian proprietors. By a long line of decisions, commencing with Garrett vs. Chambers, 3 O., 497, and ending with Limbeck vs Nye, 47 O. S., 336, the Supreme Court of Ohio has held that the land covered by all water in the State, except by Lake Erie, belongs to the riparian proprietors.

In this case the premises in controversy would belong to the riparian proprietors, to be divided according to the rules of law between the Appellant, as successor to Margaret Bailey, and Norton and Howells as patentees of the islands, or their grantees.

In neither of the above cases did the United States retain any title to any part of the premises in controversy, and the title of the Cedar Point Club must fail as the Court below says "without reference to the goodness or badness of Appellant's title."

III.

If there was no body of water here which was meanderable, in other words, if the plat of Lytle was an entire mistake, and the premises in controversy were as the learned counsel on the other side called them, a "mere swamp," or as the court below describes them, "a low, swampy body of land, partly boggy, partly dry," then by the terms of the grant and under the authority of Whitney vs. Detroit Lumber Company, 78 U. S. 240, approved by this Court in Horne vs. Smith, 159 U. S. 45, the Bailey grants went only to the straight lines, which would have been the boundary of the Bailey sections "if accurately surveyed," leaving the 1,700 acres outside of these lines, as run by Marston, to the Cedar Point Club or to the patentees of the islands, as the courts may decide.

Respectfully submitted,

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